IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 916 of 2006
With
CRIMINAL REVISION APPLICATION No. 364 of 2006
(Suo Motu)
With
CRIMINAL APPEAL No. 1640 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SUBHASHBHAI CHANDUBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

==========

Appearance:

Criminal Appeal No.916 of 2006

Mr. YV Brahmbhatt for the appellant
Mr. RC Kodekar for the respondent – State of Gujarat

Criminal Revision Application No. 364 of 2006
(Suo-Motu revision application)

Mr. RC Kodekar APP for State
Mr. YV Brahmbhatt for the accused

Criminal Appeal No. 1640 of 2006

Mr. RC Kodekar, APP for appellant – State of Gujarat
Mr. YV Brahmbhatt, for respondent – Org. Accused No.1.

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 21/09/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Appellant ('the accused' for short) and another accused, Sajanben Mohanbhai Gohil, were charged and tried by the learned Additional Sessions Judge and 4th Fast Track Court, Nadiad, in Sessions Case No. 207 of 2002 for commission of the offences punishable under Sections 498-A and 306 of the Indian Penal Code ('IPC' for short) on the accusation that they inflicted mental and physical cruelty to deceased Nitaben and abetted her to commit suicide. At the end of the trial, as the accused was found guilty of the offences with which he was charged, he was convicted vide judgment and order dated 19.4.2006

for commission of the offences punishable under Sections 498-A and 306 of the IPC and sentenced him to suffer RI for two years and fine of Rs.2,000/- i.d., RI for two months for commission of the offence punishable under Section 498-A of the IPC and RI for three years and fine of Rs.3,000/- i.d., RI for three months for commission of the offence punishable under Section 306 of the IPC. It is also ordered that both the sentences shall run concurrently whereas another accused, Sajanben Mohanbhai Gohil, was acquitted by giving benefit of doubt.

2. The accused, aggrieved by the judgment and order of conviction and sentence, has filed Criminal Appeal No. 916 of 2006 with the aid of Section 374 of the Code of Criminal Procedure, 1973 ('the Code' for short).

3. The appeal was placed for admission hearing before a learned Single Judge of this Court (during summer vacation). The learned Single Judge, vide order dated 18.5.2006, admitted the

appeal. However, the learned single Judge has observed that on perusal of the judgment rendered by the learned Judge and taking into account the entire gamut of evidence and the fact that reasons are not assigned for imposing less sentence under Section 306 of IPC, Suo Motu notice for enhancement of sentence be issued under Section 377 of the Code making it returnable on 14.6.2006. The Registry has, therefore, numbered the suo-motu proceedings as Criminal Revision Application No. 364 of 2006.

4. The State of Gujarat has also, aggrieved by the judgment and order passed by the trial court, filed Criminal Appeal No.1640 of 2006 with the aid of Section 377 of the Code, on the ground of inadequacy of the sentence imposed on the accused.

5. As all the above numbered proceedings are arising out of the same judgment and order, they are heard together, decided and are being disposed of by this common judgment.

6. The prosecution case, as disclosed from the accidental death report and the complaint filed by the complainant, P.W.2, Sureshbhai Chhotabhai Patel, Ex.20, who is the cousin brother of deceased Nitaben and unfolded during the trial is as under:

6.1. On 1.8.2001, deceased Nitaben, wife of the accused, was shifted to Kheda Civil Hospital by the accused and relatives as she had taken some poisonous substance and was vomiting. She was treated by the doctor and Kheda Police was informed by the Medical Officer on telephone and a telephone-vardhi was registered by Matar Police at about 00.55 hours on 2.8.2001. Matar Police was also informed by the complainant Sureshbhai that by any reason Nitaben had taken poisonous substance at her home and she was admitted in Kheda Civil Hospital and ultimately she died. The span of marriage life was more than 11 years and it was her second marriage and the incident took place at her parental house. Upon this

information, an accidental death entry was made vide Entry No.25/2001 on 2.8.2001 at about 2.15 hours. Pursuant to this entry, the Head Constable started an inquiry. Dead body of Nitaben was sent to Civil Hospital, Kheda for autopsy, recorded the statements of complainant Sureshbhai and other witnesses and also informed higher officer. During his investigation, no offence was disclosed by anyone.

6.2. Thereafter on 23.8.2001, after 23 days, Sureshbhai Chhotabhai Patel, who is the cousin brother of deceased Nitaben, lodged a written complaint before the learned JMFC, Matar, against the accused and Sajanben Mohanbhai Gohil, for commission of the offences punishable under Sections 302 and 120-B of the IPC, inter alia, alleging that his cousin sister was married with the accused and after death of his uncle and aunt, Nitaben and the accused were staying at parental home at village Sokhda. The accused had illicit relations with another accused- Sajanben Mohanbhai Gohil and the accused wanted to sell

out all properties of deceased Nitaben and settle separately with Sajanben. Sajanben used to come frequently at the residence of the accused and accused was keeping Sajanben with him and due to this illicit relation, the accused was harassing and also beating Nitaben. The complainant was informed by his niece Minakshi that deceased Nitaben was taken on the first floor of the house and her hands were caught-hold by Sajanben and the accused forcibly gave medicine (poison) and thus the accused killed Nitaben.

6.3. The said complaint was ordered to be investigated by the concerned Deputy Superintendent of Police under Section 156 (3) of the Code. Pursuant to the said order passed by the learned JMFC, Matar, investigation was carried out by the DySP and report dated 4.10.2001, Ex.43, was sent to the learned JMFC, Matar for deletion of offences under sections 302 and 120-B of the IPC and for adding Sections 498-A, 306 and 114 of the IPC. Thereafter by the

order of this Court, the order of investigation under Section 156 (3) of the Code conducted by the DySP was quashed and set aside. Thereafter further investigation was carried out by the PSI, Matar. On completion of the investigation, a charge-sheet was filed in the court of the learned Chief Judicial Magistrate, Nadiad, against the accused and another accused, Sajanben Mohanbhai Gohil, for commission of the offences punishable under Sections 498-A, 306 and 114 of the IPC.

6.4. As the offence punishable under Section 306 of the IPC is exclusively triable by a Court of Sessions, the learned Chief Judicial Magistrate, Nadiad, committed the case to the Court of Sessions Division at Nadiad.

6.5. The learned Additional Sessions Judge, 4th Fast Track Court, Nadiad, to whom the case was made over for trial, framed charge against the accused and another accused, Sajanben Mohanbhai Gohil. Both of them pleaded not guilty to the

charge and claimed to be tried. Thereupon they were put to trial and tried by the learned Additional Sessions Judge and 4th Fast Track Court, Nadiad, in Sessions Case No.207 of 2002.

6.6. To prove the culpability of the accused, the prosecution has examined as many as 13 witnesses and relied upon their oral testimony, details of which have been given in paragraph 4 of the impugned judgment and order. They are as under:

PW No.	Name	Ex.No.	Page No.
1	Dr. Chakreshwar Bhagwatilal	13	117
2	Sureshbhai Chhotabhai Patel – Complainant	20	145
3	Minakshiben Subhashbhai Patel – daughter of accused	21	153
4	Jigar Subhashbhai Patel – daughter of accused	22	159
5	Dipakkumar Sulemanbhai Christi	24	169
6	Kokilaben Dipakbhai	28	183
7	Manjulaben Kantibhai	30	199
8	Bhavinkumar Kanubhai Patel	32	213
9	Rameshbhai Shankarlal Sharma	35	227
10	Chandrikaben Bachubhai – Panch witness	36	233
11	Maiyuddinbhai Saburkhan – PSO who registered the FIR	39	257

PW No.	Name	Ex.No.	Page No.
12	Parixita Maneklal Gurjar – Investigating Officer	40	261
13	Rajeshkumar Ramjibhai Limbad – PSI – Investigating Officer	48	305

6.7. The prosecution has produced a number of documents and relied upon the contents of the same. They are as under:

S.No	Description	Ex.No.	Page No.
1	Complaint	41	281
2	Inquest Panchnama	37	237
3	Panchnama of the scene of offences	34	223
4	Death Certificate issued by General Hospital, Kheda	42	289
5	Post-mortem report	17	133
6	FSL letter	51	317
7	FSL report	16	129-131

6.8. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their

further statement the accused denied the case of the prosecution in toto. The accused has filed detailed written statement which is on record at page 351 of the paper book. The accused has also examined three witnesses in his defence. They are as under:

DW.No.	Name	Ex.No	Page No.
1	Babusinh Pujesinh Parmar, Medical Officer who gave treatment to deceased Nitaben on 31.7.2001 and also issued certificate	62	403
2	Natvarbhai Becharbhai Patel, Power of Attorney holder	65	411
3	Natvarbhai Malabhai – Investigating Officer of A.D.Case No.25 of 2001	67	425

6.9.On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has held that suicidal death of deceased Nitaben has been established. The trial court has also held that the accused has inflicted mental and physical cruelty to deceased Nitaben on account of his illicit relation with another accused Sajanben and, therefore, the accused has

abetted Nitaben to commit suicide and as a result of the abetment Nitaben took poisonous substance and during treatment she succumbed to the effect of the poisonous substance. The trial court, therefore, held that the offences punishable under sections 498-A and 306 of the IPC against the accused has been proved and accordingly he has been convicted and sentenced for the said offences about which reference is made in the earlier paragraph of this judgment whereas another accused, Sajanben Mohanbhai Gohil, came to be acquitted by giving benefit of doubt. It is this judgment and order which has given rise to the above-numbered three separate proceedings.

7. Mr. YV Brahmbhatt, learned advocate of the accused, has submitted that there is no evidence regarding cruelty meted out by the accused to deceased Nitaben and due to the cruelty at the hands of the accused Nitaben committed suicide. It is also emphatically submitted by him that it is also doubtful as to whether it is a case of

accidental death or whether due to abdominal pain the deceased had taken poisonous substance or whether someone has given her poisonous substance as there is evidence that the food and tablet was given by Lalitaba as per evidence of P.W.3 and P.W.4. It is also submitted by him that there is no evidence regarding recovery of FSL muddamal from Civil Hospital, where it was kept, who had sent it and when it was sent. According to him, there are three different information with regard to the incident. First information was a yadi regarding taking of poisonous substance by deceased Nitaben for any reason wherein it is stated that the marriage span of the accused with deceased Nitaben was 11 years as is clear from Ex.46, 47 at page 299. The second information is Ex.47, a statement before the police by the complainant that for unknown reason and due to her mental and physical illness she took poisonous drug and no suspicion for her death was raised against anybody and there was no mention about any quarrel or dispute. The third information is a written complaint before the

learned JMFC, Matar, Ex.41, for offences punishable under sections 302 and 120-B of the IPC after 23 days of the incident. According to Mr. Brahmbhatt, learned advocate of the accused, though the written complaint of the complainant Sureshbhai is not proved as original complaint is not shown to the complainant and no signature is proved, it has been wrongly exhibited. It is also high-lighted by him that a Power of Attorney was obtained by the complainant on the very day of the incident from the accused with a view to grab the properties of the accused and the deceased. D.W.2, Natvarbhai Becharbhai Patel, Ex.65 who is also a joint power of attorney holder of the accused, along with the complainant, has deposed that the properties of the accused and deceased Nitaben are personally used by the complainant and there is evidence of P.W.3 and P.W.4, Minakshiben Subhashbhai Patel and Jigar Subhashbhai Patel, Ex. 21 at page 153 and Ex.22 at page 159 respectively, who are the children of the accused, who have stated that the complainant has not given any help or

assistance to the minor children of the deceased Nitaben and the accused. According to him, child witnesses are important witnesses and as per the prosecution version and they have deposed that they have not told to the complainant that the hands of the deceased were caught hold by Sajanben and poison was forcibly given by the accused to deceased Nitaben. The child witnesses have also deposed that they were tutored by the complainant as to how the statement before the police be given and their depositions are totally different from the deposition of the complainant. They have deposed that for grabbing property of the accused and deceased Nitaben, a false and concocted case is got up by the complainant. It is also emphasized by him that the statements of other prosecution witnesses are recorded after 40 days. They are very interested witnesses and their entire depositions are contradictory. P.W.5- Dipakbhai Christi, joined the hands with the complainant and they got the accused wrongly booked in a false case. He has also high-lighted about the conduct of the accused. According to

him, as per the evidence on record, Nitaben was taken to Karoli Sarvajanik Hospital on 31.7.2001 by the accused, she was treated by the doctor, thereafter she was also taken to Civil Hospital, Kheda, on 1.8.2001 she was taken to Nadiad Civil Hospital and as per the advice of the doctors, she was taken for UCG test and at the time of incident, she was also shifted to Kheda Civil Hospital by the complainant. It is also contended by him that the trial court has wrongly disbelieved the evidence of the defence witnesses. Earlier also Nitaben had tried to commit suicide as she was suffering from abdominal pain.

On the aforesaid premises, it is contended by Mr. Brahmbhatt, learned advocate of the accused, that though there is no case against the accused for commission of the offences punishable under sections 498-A or 306 of the IPC, the trial court has wrongly believed the evidence of the prosecution witnesses and convicted the accused and, therefore, the

impugned judgment and order convicting and sentencing the accused deserves to be quashed and set aside by allowing this appeal and thereby acquitting the accused of the offences with which he was charged. He, therefore, urged to allow Criminal Appeal No.916 of 2006.

It is also submitted by him that there is no substance in the suo motu Criminal Revision Application No. 364 of 2006 as well as in the Criminal Appeal No.1640 of 2006 filed by the State under Section 377 of the Code for enhancement of the sentence and, therefore, the Criminal Revision Application No. 364 of 2006 and Criminal Appeal No. 1640 of 2006 filed by the State of Gujarat deserve to be dismissed. He, therefore, urged to dismiss the Criminal Revision Application No.364 of 2006 and Criminal Appeal No.1640 of 2006.

8. In counter submission, Mr. RC Kodekar, learned APP for the respondent -State of Gujarat, has contended that there is voluminous evidence

adduced by the prosecution which unerringly establishes that the deceased was subjected to mental and physical cruelty at the hands of the accused and the accused has also abetted her to commit suicide because of his illicit relation with Sajanben. He has further contended that evidence of P.W. Nos.2, 5, 6, 7, 8 and 9 is clear and there is no contradiction in their evidence, therefore, there is no reason to disbelieve the evidence of those witnesses who have deposed against the accused that the accused had inflicted mental and physical cruelty on the deceased and the accused has abetted her to commit suicide on account of his illicit relation with Sajanben. Therefore, according to him, the judgment and order of conviction passed by the trial court convicting the accused of the offences punishable under Sections 498-A and 306 of the IPC does not warrant any interference of this Court as the complicity of the accused is established. So far as the sentence is concerned, according to him, there was no mitigating circumstance which has persuaded the

trial court to impose lesser sentence on him. According to him, the trial court ought to have imposed the maximum sentence provided under the IPC on the accused as such offences are on increase now-a-days. He, therefore, contended that Criminal Appeal No.916 of 2006 filed by the accused challenging the conviction and sentence imposed on him lacks merit and deserves to be dismissed whereas Criminal Appeal No.1640 of 2006 filed by the State of Gujarat for enhancement of the sentence deserves to be allowed by enhancing the sentence to the maximum punishment provided under section 306 of the IPC which according to him, is RI for ten years and in that view of the matter, the Suo Motu Criminal Revision Application No. 364 of 2006 also requires to be allowed. He, therefore, urged to dismiss Criminal Appeal No.916 of 2006 filed by the accused and to allow Criminal Appeal No.1640 of 2006 and suo motu Criminal Revision Application No. 364 of 2006.

9. We have considered the submissions advanced

by Mr. YV Brahmbhatt, learned advocate of the accused and Mr. RC Kodekar, learned APP for the respondent - State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. On reappreciation, reanalysis, reevaluation and close scrutiny of the evidence, now we may discuss the salient features of the prosecution case and the undisputed facts which have come on record in the form of evidence:

(i) The accused married with Nitaben on 15.6.1990.

(ii) Father-in-law of the accused, named Ambalal, died on 1.4.1993 and mother-in-law of the accused, Kashiben, died on 23.3.2000.

(iii)Out of the wedlock of the accused and Nitaben, two children, Minakshi and Jigar are born. Minakshi was aged about 10 years and Jigar was aged about 7 years at the time of the incident. All the family members were residing at village Karoli, Taluka Petlad and after death of mother-in-law of the accused, they shifted to village Sokhda.

(iv)Nitaben was suffering from abdominal pain and previously she was operated for appendicitis and there is also deposition regarding the same by the complainant. Thereafter also on many occasions she suffered from abdominal pain. On 31.7.2000 she was taken to Karoli Sarvajanik Hospital as per suggestion of deceased Nitaben and she was treated by Dr. Babusinh, D.W.1, and certificate was also issued by him. Thereafter in the evening she was taken to Kheda Civil Hospital and Case No.6629/7 was given and she was treated. Thereafter on the next day she was taken to Civil Hospital, Nadiad and she was checked up by Dr. Nanavati and she was suggested for UCG test

and for that purpose she was taken in Santram Temple but she was advised to come on next day without taking food.

(v) The accused was called at about 9.30 p.m. on 1.8.2001 by his daughter as Nitaben was serious . Before the complainant and other neighbours were called, food and tablets were given by Lalitaba, mother of the complainant, and thereafter Nitaben vomitted and, therefore, she was shifted to Civil Hospital, Kheda by the accused and during the treatment she died.

(vi)Telephonic vardhi was given to Matar Police by the Kheda Town Police and Matar Police was also informed by the complainant and information was recorded vide A.D.No.25/2001, Ex.46, page 299 of paper book. Thereafter the police started investigation and statement of the complainant was recorded vide Ex.47, page 301 of the paper book.

(vii) Panchnama of the scene of offence was

prepared on 2.8.2001 between 9.30 A.M. and 10.00 A.M. Ex.34, page 223 of the paper book. Inquest Panchnama was also prepared on 2.8.2001 vide Ex.37, page 237 of the paper book.

(viii) Power of attorney was prepared on 2.8.2001 by the complainant in respect of all the properties of the deceased Nitaben and it was notarized before the Notary vide Ex.66, page 415 of the paper book.

(ix) Post-mortem was performed on 2.8.2001 by Dr. Chakreshwar, Ex.17, page 133 of the paper book.

(x) Complaint under Section 302 and 120-B of IPC was filed before the learned JMFC, Matar on 23.8.2001, after 23 days of the incident, and it was ordered to be investigated by DySP under Section 156 (3) of the Code, page 281 of the paper book.

(xi) Statements of the witnesses were recorded on 10.9.2001, i.e., after 40 days of the incident.

11. In aforesaid backdrop of the undisputed fact situation, we will have to examine whether the prosecution has successfully established the charge levelled against the accused for commission of the offences alleged against him and also to find out whether the trial court has rightly appreciated the evidence in its proper perspective and rightly recorded the finding that the complicity of the accused of the offences with which he was charged has been proved.

12. So far as death of Nitaben is concerned, to prove it, the prosecution has examined P.W.1, Dr. Chakreshwar, Ex.13, page 117 of the paper book, who has, inter alia, testified that on 2.8.2001 he was on duty in causality Department of Civil Hospital, Kheda. On that day, at about 1 O' clock at night, with the yadi of police and inquest panchnama and death form, dead body of Nitaben was brought to the hospital for performing autopsy. He performed autopsy and prepared the report which is at Ex.17. According to this

report, the cause of death of deceased was due to cardio respiratory arrest. It was mentioned in this report that the final cause will be given after chemical examination of viscera which was sent to Forensic Science Laboratory, Ahmedabad. FSL report is at Ex. 16. In the said report it has been stated that in the viscera aluminum phosphate, a poisonous substance was found and according to him, Aluminum Phosphate is being used for killing mouse and on consumption of the said poisonous substance, liver, lungs, kidney and heart become congested and the said poison is very effective. It is the prosecution case that the deceased died because of consumption of poisonous substance - aluminum phosphate.

In view of the aforesaid evidence, according to this Court, the prosecution has been able to prove that Nitaben died because of consumption of poisonous substance i.e., aluminum phosphate and thus it is established by the prosecution that Nitaben died an unnatural death/suicidal death.

13. After having held that the deceased Nitaben died an unnatural/suicidal death, the next question which calls for determination of this Court is whether the deceased was subjected to mental and physical cruelty at the hands of the accused and the accused has abetted her to commit suicide.

14. In this connection, first of all, we have to advert to the evidence of P.W.2, Sureshbhai Chhotabhai Patel, the complainant, whose evidence is at Ex.20, page 145 of the paper book. He has, inter alia, testified that the deceased was his cousin sister and her marriage was solemnized with the accused prior to 12 to 13 years of the incident and out of the said wedlock the accused has two children, one female and a male. After death of his uncle and aunt, the accused came to Sokhda for mental peace. In village Sokhda his uncle Ambalal had 10 vigha of land and a house which he has given to his deceased cousin sister, Nitaben. The accused stayed there for one year.

He was not doing any activity and was demanding money from his cousin sister Nitaben. Throughout the day he was remaining out of the house and nobody knew where he was going. Thereafter he came with one Sajanben Mohanbhai Gohil (another accused) and kept her in the house and ill-treated his cousin sister Nitaben and thereby meted out mental and physical cruelty to her and since Sajanben Mohanbhai Gohil was staying with the accused, his cousin sister, Nitaben, committed suicide. He has also testified that he has given complaint to Matar Police Station wherein he has stated that something unusual had happened to his cousin sister Nitaben and she consumed poisonous drugs. He has also testified that since the police has not been investigating he has filed complaint in the court of the learned JMFC, Matar. He has also testified that the police has not recorded his statement. In his cross-examination he has admitted that after death of his uncle he used to manage and look after the administration of the land and his aunt was keeping the account. He was only doing the

supervision work. He has denied the suggestion that after death of Nitaben he is taking the crops from the land. He has also admitted that after death of Nitaben, a Power of Attorney was executed in his favour by the accused which was also notarized. He has also admitted that as per the said Power of Attorney, he used to manage the affairs of the land. He has also admitted that in his complaint filed before the learned JMFC, Matar, he has stated that poisonous drug was administrated to Nitaben after her two hands were caught hold. He has also admitted that he has stated this fact after having heard it from the two children of Nitaben. He has also admitted that on an earlier occasion also Nitaben had tried to commit suicide.

15. The prosecution thereafter examined P.W.3, a child witness, Minakshi, who is the daughter of deceased Nitaben and accused, at Ex.21, page 153 of the paper book. The trial court, after ascertaining that the witness understands the sanctity of oath has recorded her evidence on

oath. She has, inter alia, testified that she has never seen another accused, Sajanben Mohanbhai Gohil, in her house. On the day of the incident, her mother got abdominal pain and her grand-mother Lalitaba gave her food. Thereafter her mother fell down because of vertigo. There was a cyst in her abdomen. Thereafter her father was called who shifted her mother to hospital. In her cross-examination she has testified that the complainant Sureshbhai is her maternal uncle and he never came to her house after death of her mother. The complainant has called the police. She has also testified that the land at Sokhda village belongs to his maternal grand-father Ambalal. After death of her mother, the land is being cultivated by her maternal uncle i.e., complainant Sureshbhai. After death of her mother, her uncle Sureshbhai has got executed a Power of Attorney from his father whereby land, house and ornaments were taken by him and thereafter her uncle has not helped her. On being asked specific question as to why her maternal uncle, the complainant, has filed the case, she

replied that it was for the purpose of grabbing the property.

16. Similar is the evidence of P.W.4, another child witness, Jigar Subhashbhai Patel, who is the son of the accused and deceased Nitaben, who has been examined at Ex.22, page 159 of the paper book. The trial court, after asertaining that the witness understands the sanctity of oath has recorded his evidence on oath. He has reiterated that after death of his mother, the complainant Sureshbhai has not rendered any assistance or help to him.

17. A comparative analysis of the evidence of P.W.2, Sureshbhai- the complainant, P.W.3, Minakshi, daughter of the accused and deceased Nitaben and P.W.4, Jigar, son of the accused and deceased Nitaben, it appears that the complainant Sureshbhai is not telling the correct facts before the court and there is no reason to disbelieve the two child witnesses, P.W.3, Minakshi and P.W.4, Jigar, who have no enmity

with the complainant Sureshbhai as he being their maternal uncle. There is also evidence to the effect that on the very same day of the incident, a Power of Attorney was prepared by the complainant which was executed by the accused in favour of the complainant wherein the land, house, gold ornaments as well as fixed deposits were mentioned. By the said Power of Attorney, the complainant was authorized to manage the same. However, thereafter the complainant has not rendered any account to the two minor children of the accused nor given any help or assistance to them. This reflects the conduct of the complainant and the possibility, that he had an ulterior desire that he can grab all the properties of the accused and deceased Nitaben as the daughter and son of the accused are minor,if the accused is booked in a cognizable offence and sent to jail, cannot be ruled out.

18. It may also be noted that the complaint filed by the complainant Sureshbhai before the JMFC, Matar was for offences punishable under sections

302 read with section 120-B of the IPC. However, during the course of investigation it revealed that offence under Section 302 of the IPC was not disclosed and, therefore, there is also a reason to believe that the complainant has filed a false complaint before the learned JMFC, Matar and misdirected the Court as well as the Investigating Officer to investigate the case for the offences under Section 302 read with Section 120-B of the IPC. The complainant has made averments in the complaint that he was informed by Minakshi, daughter of the accused, that another accused, Sajanben Mohanbhai Gohil, held both the hands of deceased Nitaben and the accused forcibly administered poisonous drug into the mouth of the deceased. But during the course of investigation, it was found that the averments made in the complaint by the complainant with regard to deceased being caught hold of Sajanben and the accused administered poisonous drug was false and, therefore, the investigating officer reported to the learned JMFC, Matar for deletion of Section 302 read with Section 102-B of the

IPC. This fact itself is sufficient to show that the complainant, with an ulterior motive, filed a false complaint with a view to grab the properties of the deceased Nitaben as well as the accused; otherwise the two minor children of deceased Nitaben would have never deposed before the court that the complaint is filed by the complainant with a view to grab the properties belonging to the accused as well as deceased Nitaben which was inherited by them from their maternal grand-father, Ambalal.

19. So far as the evidence of PW 5, Dipak Sulemanbhai Christi, Ex.24, page 169 of the paper book, P.W.6, Kokilaben Dipakbhai, Ex.28, page 183 of the paper book, P.W.7, Manjulaben Kantibhai, Ex.30, page 199 of the paper book, P.W.8, Bhavinkumar Kanubhai Patel, Ex.32, 213 of the paper book and P.W.9, Rameshbhai Shankarlal Sharma, Ex.35, page 227 of the paper book are concerned, they are interested witnesses and a perusal of their evidence clearly establishes that their statements are recorded after 40 days

of the incident and they are giving deposition before the court as per the sweet will of the complainant. The sum and substance of their evidence is that the accused was having illicit relations with another accused, Sajanben Mohanbhai Gohil, and he brought Sajanben to his house to stay with him. If this fact is correct, then probably the two child witnesses would have not denied the said fact. On the contrary, they have refused to identify Sajanben in the court.

20. So far as the evidence of P.W.12, Parixita Maneklal Gurjar, Investigating Officer, Ex.40, page 261 of the page book and P.W.13, Rajeshkumar Ramjibhai Limbad, Investigating Officer, Ex.48, page 305 of the paper book is concerned, they have admitted that prior to filing of the written complaint before the learned JMFC, Matar, by the complainant Sureshbhai, a complaint of accidental death was given and pursuant to the said report Ex.47, statement of the complainant was also recorded. In that statement the complainant has stated that his cousin sister has committed

suicide by consuming poisonous substance and he has no suspicion against anybody. The complainant has not mentioned anything in his oral testimony before the Court as well as in his written complaint filed before the learned JMFC, Matar about the statement which was recorded by the Investigating Officer, Ex.47, in pursuance of the report made about the accidental death. Therefore, according to us, there is a reason to believe that the complainant is a lier and he is minded to book the accused at any cost to grab the properties belonging to deceased Nitaben as well as the accused which was inherited by them from Ambalal, father of deceased Nitaben.

21. So far as the abetment made by the accused to the deceased to commit suicide is concerned, according to us, there is no evidence. It is a settled legal provision of law that for bringing home the charge under Section 306 of IPC, there must be some evidence adduced on record showing that soon before the incident there was some harassment and torture to the deceased at the

hands of the accused. Section 107 of IPC is with regard to the abetment and as per the provisions of this section, there must be some evidence that soon before the incident there must be some incident due to which she was prompted, instigated or abetted to commit suicide.

22. So far as the reported decision laying down the proposition of law on the question of abetment to commit suicide is concerned, they are legion. However, we would not make a reference to all of them with a view to avoid the repetition and to burden this judgment. Some of the reported recent decisions are as under :-

(i) In case of **SUSHIL KUMAR SHARMA vs. UNION OF INDIA**, reported in 2005 AIR SCW p.3569, the Supreme Court made it very abundantly clear that mere harassment or cruelty by the husband or his relatives would not constitute an offence of abetting the commission of suicide. Supreme Court in four lines has explained the correct position of law very succinctly. The relevant paragraph is reproduced herein below :

> “Basic difference between the two Sections i.e. Section 306 and Section 498-A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide while under the former provision suicide is abetted and intended.”

In the instant case, the prosecution at best can argue that whatever has been said by each of the witnesses so far as the harassment meted towards the deceased is concerned dragged the deceased to commit suicide but there is not an iota of evidence to even remotely suggest that the accused ever intended the consequences of the act or he abetted the commission of suicide.

(ii) In **SWAMY PRAHALADDAS vs STATE OF M.P. & Anr**. Reported in 1995 Supp.(3) SCC p.438, the appellant was charged for an offence under Section 306 IPC on the ground that the appellant during the quarrel is said to have remarked the deceased 'to go and die'. The

Supreme Court was of the view that mere words uttered by the accused to the deceased 'to go and die' were not even prima-facie enough to instigate the deceased to commit suicide.

(iii) In **MAHENDRASINH vs. STATE OF M.P.,** reported in 1995 Supp. (3) SCC p.731, the appellant was charged for an offence under Section 306 IPC mainly based upon the dying declaration of the deceased, which reads as under:-

> “My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning.”

The Supreme Court, considering the definition of 'abetment' under Section 107 IPC, found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the

deceased. The Supreme Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

(iv) In **RAMESH KUMAR VS. STATE OF CHHATTISGARH** reported in (2001) 9 SCC p.618, the Supreme Court while considering the charge framed and the conviction for an offence under Section 306 IPC on the basis of dying declaration recorded by an Executive Magistrate, in which she had stated that previously there had been quarrel between the deceased and her husband on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire, acquitting the accused the Supreme Court said:-

> “A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance,

discord and difference in domestic life quite common to the society to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

(v) In **Sanju alias Sanjay Singh Sengar v. State of Madhya Pradesh,** 2002 AIR SCW 2035 (SC), the Supreme Court in para 13 has observed as under:-

"Even if we accept the prosecution story that the appellant did tell the deceased 'to go and die', that itself does not constitute the ingredient of 'instigation'. The word 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary

> concomitant of instigation. It is common knowledge that the word uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with mens rea. It is in a fit of anger and emotional."

23. The principle of law which has been explained in each of the above referred to judgments of the Supreme Court is that before a person can be held guilty for abetting the commission of suicide, the prosecution must establish by cogent, convincing and overwhelming evidence that the accused intended the consequences of the act namely suicide and abetted the suicide within the meaning of Section 107 of IPC. Mere harassment or cruelty which drags the woman to commit suicide is not sufficient to constitute the offence under Section 306 of IPC.

24. Applying the principle laid down by the Supreme Court in above referred to judgments to the facts of instant case, we are of the

considered opinion that mere allegations which are general in nature with regard to the deceased was subjected to mental and physical cruelty at the hands of the accused, offence under Section 306 cannot be proved.

25. Now, coming to charge under Section 498-A of the IPC i.e. cruelty, it requires to be appreciated that it speaks of cruelty by husband or the relatives of the husband. The first part of this Section provides for the punishment for the person, namely the husband or the relative of the husband of a woman who subjects the woman to cruelty. Explanation makes it clear as to what meaning would be given to the term 'cruelty'. Explanation (a) says that any willful conduct which is of such a nature as is likely to drive the woman to commit the suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman would amount to cruelty. Explanation (b) says that cruelty would mean the harassment of the woman with a view to

coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

26. It is settled principles of law so far as Section 498-A IPC is concerned that to constitute an offence of cruelty as explained under Section 498-A of IPC, willful conduct which is of such a nature as is likely to drive the woman to commit the suicide should be cogently established to hold the accused guilty of the said offence. In the instant case, there was no demand for dowry nor abetment of suicide nor cruelty to the deceased is established. All the witnesses have deposed on the strength of information which the deceased occasionally had given to them. Such a statement is not admissible in the evidence to prove the offence punishable under Section 498-A of the IPC as such evidence is to be treated as hear-say evidence.

27. The law so far as Section 498-A IPC is concerned, needs to be examined considering the following two decisions of the Supreme Court :-

(i) Gananath Patnayak Vs. State of Orissa – 2002 SCC (Criminal) 461.

(ii) Inderpal Vs. State of M.P. - 2002 Cri.L.J.926.

28. The ratio of both the decisions is to the effect that all the statements made by the deceased to her family members regarding the alleged harassment and cruelty meted towards her would fall within the purview of hearsay evidence. It is an admitted fact that none of the witnesses examined by the prosecution have said that they have with their eyes seen the accused assaulting the deceased or treating her with cruelty. Such a statement is not admissible in evidence for the offence punishable under Section 498-A of IPC and has to be termed as being only a hearsay evidence.

29. This court in case of **INDRASINGH M. RAOL VS. STATE OF GUJARAT,** reported in 1999(3) GLR p.2536 has explained the concept of cruelty within the meaning of the definition as provided under Section 498-A of IPC. The ratio of this decision is that every act of cruelty or harassment is not made a crime under Section 498-A. The prosecution has to establish that the cruelty or harassment was unabetted, incessant and persistent and being grave in nature unbearable and the same was with the intention to force the woman to commit suicide or to fulfill illegal demand of dowry of the husband or her in-laws. As held by this Court, Section 498-A will not come into play in every case of harassment and/or cruelty. Reasonable nexus between cruelty and suicide must be established. It should, therefore, be shown that the incessant harassment or cruelty was with a view to force the wife to end her life or fulfill illegal demands of her husband or in-laws, and was not matrimonial cruelty, namely, usual wear and tear of matrimonial life.

30. The matter does not rest here. The accused has also examined three witnesses in his defence. First of all, we will examine the deposition of DW 1, Babusinh Pujesinh Parmar, Medical Officer, Ex.62, page 403 of the paper book. He has, inter alia, testified that he is serving for the last four years at Karoli Sarvajanik Hospital as Medical Officer. Subhashbhai and his wife Nitaben were known to him. On 31.7.2001 Nitaben came to him along with her husband, Subhashbhai, with the complaint of abdominal pain. He has issued Case Paper No.1877. He advised her for sonography. In cross-examination he has admitted that he has given injection of anti spasmodic for reduction of pain in abdomen and prescribed cyclopam and Ratinin tablets. From the evidence of this witness one thing has become certain that the deceased was having complaint of abdominal pain and she was regularly taking treatment and for the said ailment, sonography was also advised. Therefore there is a reason to believe that the ailment was of chronic nature. It has also come in evidence from the complainant that in the past

also Nitaben had tried to commit suicide and, therefore, possibility that with a view to relieve herself from the excruciating and unbearable pain she might have decided to put an end to her life, cannot be ruled out.

31. DW 2, Natvarbhai Becharbhai Patel, Ex.65, page 411 of the paper book, has, inter alia, testified that the accused has executed a power of attorney in his name as well as in the name of the complainant Sureshbhai. The said power of attorney was prepared by the complainant Sureshbhai which was notarized before the notary. He has read the said power of attorney wherein there is mention about the management and administration of the properties of the accused. He has denied that he has administered the property on the basis of the said power of attorney. He has also stated that the complainant Sureshbhai was not asking him anything for the administration of the property. The complainant Sureshbhai has never informed him about the returns of the property. Silver and gold

ornaments and fixed deposits are with the complainant Sureshbhai. He has deposed that as he was asked by the people of the village to sign the power of attorney, he signed it. A couple of time he had asked Sureshbhai about the administration of the properties and at that time Sureshbhai told him that he is maintaining the books of accounts. In his cross-examination he has admitted that there is no mention in the power of attorney for keeping the gold ornaments and fixed deposits with the complainant Sureshbhai. A close analysis of the evidence of this witness unequivocally suggests that the accused has executed the power of attorney in favour of this witness as well as in favour of the complainant. As per the evidence of DW 2 and PW 3 and PW 4, Sureshbhai is not taking any care of their property nor he is rendering any assistance or help to them. Therefore, it is not understood as to what was the earthly reason for the complainant Sureshbhai to prepare the power of attorney and to get it executed in his favour and get it notarized on the very day of the

incident. According to us, the reason is very obvious. The property which the complainant wanted to manage by way of the power of attorney was belonged to his uncle, Ambalal, father of deceased Nitaben, and after the demise of his cousin sister Nitaben, he might have been minded to take all the properties in his hand and if the accused is not booked in such type of a crime and sent to jail, then he may create hurdle in his way of garbing the property.

32. So far as the evidence of DW 3, Natvarbhai Malabhai, Investigating Officer of Accidental Death No.25 of 2001, Ex.67, page 425 of the paper book, is concerned, he was working as a police constable at the relevant time at Matar Police Station. On 1.8.2001 at about 23.00 hours he was on duty and one Vardhi was sent to the police station on telephone by the hospital about serious condition of Nitaben. He, therefore, went to the ward in Civil Hospital and recorded the statement of Sureshbhai. Sureshbhai has not given any information about commission of any

cognizable offence nor he has raised suspicion or doubt about anybody. Accordingly he reported the said vardhi as accidental death and statements of witnesses were recorded. During the course of his investigation, the investigation was ordered to be handed over and transferred to Senior PSI. He has further stated that during 15 days period Sureshbhai had not come to him for registering any complaint against anybody.

33. A close scrutiny of the evidence of defence witnesses unequivocally suggests that the deceased was suffering from abdominal pain which was chronic in nature and, therefore, possibility that to get herself relieved from the excruciating and unbearable pain she might have committed suicide by consuming poisonous drug, cannot be ruled out. At the cost of repetition, be it stated that the complainant got the power of attorney executed by the accused in favour of Natvarbhai Becharbhai Patel, DW 2 and himself for the administration and management of the property

of the accused and deceased Nitaben as mentioned in the said power of Attorney. But, as per the oral testimony of the witnesses, the property is being managed by the complainant only and he has not rendered any account or given any assistance or help to the children of the accused and, therefore, the complainant, with a view to grab the property of the deceased as well as the accused which was originally belonged to his uncle- Ambalal, has filed false complaint against the accused and got him booked in a cognizable offence so that the accused on conviction would go to jail and nobody would be there to interfere him in the management of the property.

34. At this stage, it would be appropriate to refer to the written statement tendered by the accused in his further statement which is on record in vernacular language and its free translation in English language is furnished by Mr. Brahmbhatt, learned advocate of the accused, wherein it is, inter alia, stated by him as under:

“I, accused No.1, submit my additional written reply as under:

(i) That I married Nita, a resident of village Sokhda and the marriage ceremony was performed at Nadiad, on 15.6.1990. It was my first marriage while Nita had earlier married with one Girishbhai Jeshbhai Patel, resident of village Petli and out of this marriage one child was born and as there was difference of opinion, they took divorce.

(ii)After marriage we were residing at Karoli village, Taluka Petlad and I was doing agriculture work and also doing business of wood. We both husband and wife were living peacefully and out of our wedlock two children are born, in which elder daughter is born on 15.7.1991 and son Jignesh is born on 7.1.1995.

(iii) My father-in-law, named Ambalalbhai, died on 1.4.1993 due to illness and my

mother-in-law Kusumben died on 23.3.2000. As my father-in-law was ill, his own 10 'Vighas' of land was under cultivation of complainant and after death of my mother-in-law, we, husband-wife and children, shifted at my in-law's house at village Sokhda and I was looking after the land and agriculture and was also doing the business of wood. As we shifted our residence at village Sokhda, the complainant did not like it and he was not behaving properly with us and he was also keeping grudge against my wife.

(iv)My wife was suffering from pain in abdomen and earlier she was operated for abdominal pain. Due to abdominal pain, she was treated by the doctor of Sarvajanik Hospital and she felt good.

(v) On 31.7.2001, my wife suffered severe abdominal pain and for that, on the same day as per her wishes she was taken to Dr. Parmar at Karoli as the medicines prescribed

by him had suited her, by rickshaw, for treatment. Thereafter again as she was suffering from abdominal pain, she was taken to Kheda Civil Hospital in the evening and there OPD Case No.6629/7 was prepared and she was treated. Thereafter on next day, i.e., 1.8.2001, as she was not well, she was taken to Nadiad Civil Hospital and she was checked up and treated by Dr. Nanavati and she was advised for UCG test. I took her at Santram Temple for test but she was advised to come without taking any food.

(vi)Thereafter we came back at our village Sokhda. when I was in my field, which is situated near village, at about 9.30, I was called by my daughter and told that something has happened to 'Mummy'. So I immediately returned to my home and after inquiry, I found that my wife was semi-unconscious and on asking my wife told that my mother-in-law aunt named Lalitaben gave tablet and also leaf and vegetable.

Thereafter my wife was shifted to Civil Hospital, Kheda where she treated but during treatment my wife has expired.

(vii) During treatment of my wife, the police was informed from the Civil Hospital and the complainant had also informed the police. The police came from Matar Police Station and investigated and I was also asked (inquired) and statement of the complainant was recorded and statements of all persons present were recorded and inquiry was made.

(viii) Thereafter in the morning one Mr. Christi Dipakbhai Sulemanbhai of our village, an associate of the complainant and also a court-bird, came there and after consultation with the complainant, he started exchange of hot words and also made false allegations against me.

Thereafter it was told by the complainant that I should not enter in the village and I

should also give in writing regarding all properties and if I will not give in writing, then I was told that I would be implicated in false case. Thereafter at about 10.30 a.m. my signature was obtained on a stamp paper and signature was also obtained on a blank paper and I was put in fear.

(ix)As my wife has died, I was in depression mood and I was in dilemma and nobody of my favour was present, so I acted upon their say and after completion of post mortem examination and after receiving dead-body of my wife, we performed funeral ceremony of my wife at my native place.

(x)After 17 to 18 days thereafter, I went to village Sokhda along with my children. At that time, the complainant started quarrelling with me and asked me as to why did I come to village Sokhda and I was told to go back, otherwise threat was given of filing of case against me. I told that as my

children are studying and for their future, I have to cultivate the land. The complainant became angry and his friend Deepkbhai Christi was called and again they quarreled with me and both of them gave me threat of implicating me in false case.

(xi)Thereafter they both filed one criminal complaint for the offence punishable under Section 302 of the IPC before the Court of learned JMFC, Matar and the hand-packet of order was obtained by Shri Dipakbhai. As I came to know about it, I approached the Honourable High Court for anticipatory bail by filing Misc. Criminal Application No.8292 of 2001 and I obtained anticipatory bail.

(xii) My children were put into fear and after giving threat, concocted and got up evidence was created and a false case was prepared against me.

(xiii) The Investigating Officer has not

investigated the case independently and truly and upon a false investigation I am implicated in a serious offence.

(xiv) Thereafter I obtained regular bail from the Honourable High Court by filing Misc. Criminal Application No.9043 of 2001. Thereafter the complainant of this case is administering my land (agriculture), house and ornaments and fixed deposits, etc., and using them for his personal use and consumption.

He has never bothered for the future of my children till today and he has not taken care and also not helped economically and has also not given anything or books for study or clothes to my children.

(xv)The complainant of this case has implicated me in a false case with an intention to grab my property and with an intention that I may not enter into village

and after 21 days, by creating false and got up case and by creating false evidence of relatives and friends, he tried that I may be falsely convicted in a false case. I am totally innocent and all allegations against me and the deposition given by the witnesses are false and contradictory and got up one. I have no any illicit relation with accused No.2 and I have never given any torture to my wife and my wife has not committed suicide due to cruelty given by me.

But, either someone has given poisonous tablets to my wife or my wife has taken poisonous tablets due to unbearable abdominal pain, However, I am falsely implicated. So I am submitting my further written statement before this Honoruable court which may be considered and justice may be done to me."

35. On a comparative analysis of the evidence of the prosecution witnesses, defence witnesses and

further statement of the accused, we are of the opinion that the statement of the accused inspires confidence and trustworthy and reliance can be placed upon it.

36. At this stage, it would be advantageous to refer to the decision of the Supreme Court in the case of Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217. In the said decision, the Supreme Court has held that there are two important factors in every criminal trial that weigh heavily in favour of an accused person; one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonable explanation of his conduct, then, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.

37. In the case of Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170, the Supreme Court has

observed as under:

> ”(1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;
>
> (2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and
>
> (3) that the onus of proof never shifts. It is true that under sec.105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, from the cardinal principles referred to above, it follows that it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by sec.5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court. This aspect of the matter is no longer *res integra* but is

concluded by several authorities of this Court."

38. In the case of Bharatkumar Jaimanishanker Mehta v. State, 1982 (1) GLR 605, a Division Bench of this Court, relying upon the judgment of the Supreme Court in Rabindra Kumar Dey's case (supra), the relevant portion of which is quoted in para 12, has held as under:

> "It is true that after it is established that the accused accepted the amount, presumption under sec.4(1) of the Prevention of Corruption Act would arise. But for the purpose of coming to the conclusion as to whether the accused accepted the amount or not, the totality of the evidence led at the trial is required to be appreciated. The prosecution evidence alone cannot be considered for the purpose of coming to the conclusion as to whether the accused accepted the amount or not. The evidence led by the prosecution, the suggestions made by the defence in cross-examination of the prosecution witnesses, the version given by the defence and the defence witnesses, if any, examined at the trial, everything is required to be considered in its totality and it is to be seen as to whether the total effect of the entire evidence led before the Court is of a nature by which the only conclusion possible was that the accused accepted the amount. If such a conclusion is possible then alone it can be held that the prosecution established the case beyond reasonable doubt."

39. Applying the principles laid down by the

Supreme Court as well as this Court in the above referred to judgments to the facts of the present case, the explanation and assertions with regard to the conduct of the accused offered by him in his written statement tendered while recording his further statement even though are not proved they should ordinarily be accepted unless the circumstances indicate that they are false. In the instant case, this Court has discussed the evidence adduced by the prosecution as well as the defence evidence in detail and according to this court, the prosecution has failed to prove that the explanation offered by the accused is false. On the contrary, according to this Court, the explanation offered by the accused is in consonance with the prosecution case.

40. On overall appreciation of the evidence of the prosecution witnesses and defence witnesses, according to us, the following points can be culled out:

(i) Suicidal death of Nitaben is proved.

(ii)The complainant Sureshbhai Chhotabhai Patel is a lier and he has no regard for the truth.

(iii) The complainant has given report of accidental death to Matar Police Station immediately after her death. Thereafter his statement was recorded wherein he has unequivocally stated that his cousin sister Nitaben has committed suicide and he has not raised any doubt against the accused at that time about his involvement in any offence.

(iv)The same day on which Nitaben died, the complainant prepared a power of attorney and got it executed by the accused in his favour and it was notarized and by way of the power of attorney he has obtained the power to manage and look after the administration of the properties of the accused and deceased Nitaben. Therefore, possibility cannot be ruled out that under the guise of filing false complaint against the accused, the complainant got executed the power

of attorney in his favour; otherwise we find no earthly reason for the accused to execute power of attorney in favour of the complainant in respect of the properties which he and his deceased wife Nitaben inherited from her father Ambalal.

(v) Written complaint was filed by the complainant after 23 days of the incident, in the Court of learned JMFC, Matar. In the said complaint, nowhere he has stated that the police has refused to register his complaint. The investigating officer has unequivocally stated that the complainant has not come to file complaint against the accused up to 1.9.2001. Therefore, the written complaint filed by the complainant in the Court of learned JMFC, Matar was with a view to command the accused so that in future he may not obstruct the complainant in managing the properties.

(vi)There is no reason to disbelieve the child witnesses who have unequivocally deposed that

they were tutored by the complainant to give deposition. In Court they have stated the correct facts. They have further stated in their deposition that from the day of the incident till date of recording their deposition in the Court, no help or assistance was rendered by the complainant to them. They have also denied the allegation that the accused had kept another accused, Sajanben Mohanbhai Gohil, in their house. They even did not identify her in court.

(vii) The Nitaben was suffering from abdominal pain for which she was taking treatment. On the previous day of the incident also she was taken to hospital by the accused. On an earlier occasion she had tried to commit suicide. Therefore, the possibility that she might have committed suicide by consuming poisonous substance cannot be ruled out.

(viii) There is no evidence to prove the complicity of the accused beyond reasonable doubt.

(ix)Prosecution witnesses Nos.5, 6, 7, 8 and 9 are interested witnesses and they deposed before the Court as per the sweet will of the complainant and, therefore, their depositions do not inspire confidence.

(x) Nobody has complained that the relation of the accused with deceased Nitaben was strained. Only the complainant and interested witnesses whose statements were recorded after 40 days of the incident have stated so. If at all the relation of the accused with deceased Nitaben was not cordial and strained, immediately after the incident, the complainant would have lodged a complaint against the accused and he would not have reported that it was an accidental death.

(xi)There is no reason to disbelieve the evidence of the defence witnesses.

(xii) The explanation offered by the accused in his further statement and in his written

statement inspires confidence and it is in consonance with the evidence on record.

(xiii) The complainant has not explained the delay in filing the complaint. The written complaint was filed after 23 days of the incident. Prior to that also he gave an accidental death report and in connection with that his statement was recorded wherein he has not stated anything against the accused.

(xiv) The prosecution has failed to prove the charge levelled against the accused for commission of the offences punishable under Sections 498-A and 306 of the IPC.

(xv) There is nothing on record to show that the relation of the accused with the deceased Nitaben was not cordial or strained. There is no evidence to prove that the deceased was subjected to mental and physical cruelty at the hands of the accused.

(xvi) On the day of the incident the accused was not in the house. Therefore there is no question of his abetting the deceased to commit suicide.

(xvii) The relation of the accused with the deceased Nitaben was so cordial that the accused used to take her to hospital. Even on the previous day the incident, the accused had taken Nitaben to hospital and she was also taken to Santram Temple for sonography test.

41. On overall appreciation of the evidence, according to us, the judgment and order of conviction and sentence passed by the trial court does not stand to scrutiny of this court and this Court is of the opinion that the trial court has committed grave error in holding the accused guilty for commission of the offences punishable under Sections 498-A and 306 of the IPC as complicity of the accused for commission of the said offences is not proved. Therefore, the judgment and order of conviction and sentence

passed by the trial court against the accused deserves to be quashed and set aside by allowing this appeal and by acquitting the accused of the offences with which he was charged, whereas notice issued in suo motu Criminal Revision Application deserves to be discharged and the Criminal Appeal filed by the State of Gujarat for enhancement of the sentence deserves to be dismissed.

42. For the foregoing reasons, Criminal Appeal No.916 of 2006 filed by the appellant (accused No.1) is allowed. The judgment and order dated 19.4.2006 passed by the trial court in Sessions case No.207 of 2002 convicting and sentencing the appellant (accused No.1) for the offences punishable under section 498-A and 306 of the IPC is quashed and set aside and the appellant (accused No.1) is acquitted of the offences with which he was charged. The accused is in jail. Therefore, he is ordered to be released forthwith if he is not required in connection with any other case. Fine, if paid by him, shall be

refunded to him.

In suo motu Criminal Revision Application No.364 of 2006, notice issued for enhancement of sentence is discharged. Criminal Revision Application (Suo Motu) No.364 of 2006 stands disposed of accordingly.

Criminal Appeal No.1640 of 2006 filed by the State of Gujarat for enhancement of the sentence fails and accordingly it is dismissed.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

...

(karan)